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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-78

WARREN A. McFADDEN,
Petitioner,

v.

G. H. McSHANE CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Should this Court grant review of a Court of Appeals decision which held that one who acts in good faith under a presumptively valid statutory procedure should not later be held liable in money damages under 42 U.S.C. §1983 when the procedure is overturned, where said decision is entirely consistent with the rulings of other federal courts, and where there is no valid public policy reason for changing the prevailing rule which disfavors the retroactive application of a change in the law?

STATEMENT OF THE CASE

In this matter Petitioner (defendant below) seeks to have this Court review the action of the United States Court of Appeals for the Third Circuit in affirming the dismissal of Petitioner's counterclaim by the United States District Court for the Western District of Pennsylvania. The Third Circuit's decision marked the conclusion of a long and complicated litigation between the parties.

This action was commenced by Respondent, a Pennsylvania corporation, on October 1, 1974, in the Court of Common Pleas of Allegheny County, Pennsylvania, by praecipe for writ of foreign attachment pursuant to Rule 1251, *et seq.*, of the Pennsylvania Rules of Civil Procedure. Three days later, within the time period permitted by Pennsylvania Rule of Civil Procedure 1265, Respondent filed its complaint in assumpsit against Petitioner, a citizen of the State of Florida. Copies of the writ of attachment and complaint were duly served on the garnishees during the month of October, 1974, and on Petitioner at his residence in Fort Lauderdale, Florida on or about October 25, 1974. Respondent's complaint claimed damages in the amount of $150,000 for breach of a contract for a real estate broker's

commission in connection with Petitioner's purchase of two parcels of real estate, one in Allegheny County and one in Butler County, Pennsylvania.

The right of a plaintiff to first secure a lien on a nonresident defendant's assets within the Commonwealth of Pennsylvania by a writ of foreign attachment, and then to judicially determine what if anything was due from defendant to plaintiff, existed and was frequently enforced in Pennsylvania for about 140 years. Act of June 13, 1836, P.L. 568, 12 P.S. 2861; *Liebermann v. Hoffman*, 2 Penny. 211 (1882). A writ of foreign attachment was an original writ which was used to commence an action against property, and not a person, and the res to be attached must have been within the jurisdiction of the court. ***Atkins v. Canadian SKF Co.***, 353 Pa. 312 (1946); ***Falk Co. v. American Railway Express Company***, 79 Pa. Super. 99 (1922). The purpose of a proceeding in foreign attachment was twofold: (1) to compel a nonresident to appear within the jurisdiction of the courts of Pennsylvania and defend plaintiff's claim, and (2) to secure a fund out of which plaintiff's claim against the nonresident, when reduced to judgment, could be paid. *Sniderman v. Nerone*, 136 Pa. Super. 381, affirmed on the opinion of the Superior Court, 336 Pa. 305 (1940); *Marano v. Granata*, 151 Pa. Super. 454 (1943). The requirements for a proceeding in foreign attachment were set forth in Rules 1251-1279 of the Pennsylvania Rules of Civil Procedure.

On October 30, 1974 Petitioner removed the action to the United States District Court for the Western District of Pennsylvania based upon diversity of citizenship. Several weeks later Petitioner filed a counterclaim which claimed damages in the aggregate amount of $4,000,000, allegedly resulting from the attachment of Petitioner's rental proceeds from the Smithfield Plaza Building in Pittsburgh, Pennsylvania, one of the two pieces of real estate upon which Respondent's claim for a real estate commission was based.

Petitioner's counterclaim acknowledged that he is a nonresident of Pennsylvania. The counterclaim did not allege that Respondent failed to comply fully with all of the procedural requirements of the Pennsylvania Rules of Civil Procedure in requesting that a writ of foreign attachment be issued by the Court of Common Pleas of Allegheny County and served upon the garnishees. The counterclaim also failed to allege that Respondent acted in bad faith or with an improper motive in attaching Petitioner's rentals. (63a). The sole legal basis for the counterclaim was the assertion, pursuant to 42 U.S.C. §1983, that the Pennsylvania foreign attachment procedures are violative of the Fourteenth Amendment of the Constitution of the United States, and that Respondent engaged in unconstitutional conduct by having made use of said procedures.

Respondent moved to dismiss the counterclaim on alternate grounds. The first ground for dismissal was that the Pennsylvania foreign attachment rules were not violative of the Fourteenth Amendment. Alternatively, Respondent's motion to dismiss asserted that even if the foreign attachment procedures should be held unconstitutional at some future date, Respondent could not be held liable for actions taken in good faith under color of existing law. By order dated January 31, 1975, the late Judge Wallace S. Gourley of the District Court dismissed Petitioner's counterclaim on the ground that the Pennsylvania foreign attachment procedures were not in violation of the Constitution of the United States. (3a).

In the meantime, Respondent having refused to dissolve the attachment, Petitioner McFadden filed a separate action in the District Court against Respondent McShane and others, at Civil Action No. 74-1090, requesting that a three-judge court be convened, that the Pennsylvania foreign attachment procedures be declared unconstitutional and that McShane's attachment be dissolved. The complaint at

Civil Action No. 74-1090 did not request an award of money damages. On December 2, 1974, Judge Gourley dismissed McFadden's complaint at Civil Action No. 74-1090, again holding that the Pennsylvania foreign attachment procedures were not unconstitutional. (65a). Indeed, Judge Gourley at that time ruled that, in view of the Third Circuit's decision in *Lebowitz v. Forbes Leasing and Finance Corp.*, 456 F.2d 979 (3d Cir. 1972), cert. den. 409 U.S. 843, reh. den. 409 U.S. 1049, and the then recent decision of Judge Rosenberg of the District Court in *Balter v. The Bato Company, Inc.*, 385 F.Supp. 420 (W.D. Pa. 1974), McFadden's complaint failed to raise a substantial constitutional question. (65a-66a). On appeal from the dismissal of his action at Civil Action No. 74-1090, the Third Circuit vacated Judge Gourley's order and remanded the case for hearing before a three-judge court. (69a). 519 F.2d 1398 (3d Cir. 1975). On January 27, 1976, in an unrelated case, the Third Circuit reversed the position which it had taken several years previously in *Lebowitz* and held that the Pennsylvania foreign attachment procedures are violative of the Fourteenth Amendment. *Jonnet v. Dollar Savings Bank of the City of New York*, 530 F.2d 1123 (3d Cir. 1976). Several days later (February 2, 1976), and based entirely upon the *Jonnet* decision, the three-judge court in the case at Civil Action No. 74-1090 found the Pennsylvania foreign attachment rules to be unconstitutional and enjoined the further attachment of McFadden's rents. (74a-79a).

On March 15, 1976, the Honorable Daniel J. Snyder of the District Court, having presided at a nonjury trial of Respondent McShane's claim against Petitioner McFadden, entered judgment against Respondent. In his Opinion Judge Snyder found that the disputed $150,000 commission had been earned by Respondent and that Petitioner had agreed to the payment of a commission in that amount; however, the Court found that the two parcels of real estate had not yet

yielded sufficient revenues to pay the $150,000 commission. Thus, Judge Snyder entered Judgment in the favor of Petitioner without prejudice to the right of Respondent to claim in another action that sufficient revenues exist to pay its claim (4a-33a).

On March 25, 1976, more than a year after the counterclaim had been dismissed, Petitioner filed a motion to vacate the dismissal of his counterclaim, based upon the fact that said dismissal was grounded upon authorities which had subsequently been overruled. The parties then filed a stipulation which provided that the District Court, in ruling upon Petitioner's said motion, could consider the broad question of whether, under any circumstance, the counterclaim states a claim upon which relief can be granted, rather than limit its consideration to the narrower question of whether the basis for Judge Gourley's earlier dismissal of the counterclaim was incorrect. In an Opinion and Order dated May 19, 1976, Judge Snyder denied Petitioner's motion to vacate the dismissal of his counterclaim. (34a-53a).

On appeal from Judge Snyder's decision the Third Circuit affirmed the dismissal of Petitioner's counterclaim by Opinion and Order dated April 26, 1977 (55a-64a). In its ruling the Court of Appeals followed its decision in the earlier case of *Kacher v. Pittsburgh National Bank*, 545 F.2d 842 (3d Cir. 1976), and held that a party is justified in relying upon the constitutionality of existing state procedures until such procedures are specifically overturned. (61a). The Court also held that its decision in *Jonnet v. Dollar Savings Bank of the City of New York, supra*, should not be applied retroactively so as to permit Petitioner to recover money damages from a potential creditor who acted under a presumptively constitutional statutory scheme. (62a).

The Petition for Writ of Certiorari followed.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL ON THE ISSUES DECIDED BY THE COURT BELOW

The essence of the Third Circuit's decision in this case is that one who relied in good faith upon existing state rules of civil procedure cannot later be held liable in damages when such procedures are overturned because, "[T]o do otherwise . . . would 'work an injustice on those. . .who acted in accordance with a time-honored and court-tested proceeding.' " (61a). This ruling is wholly consistent with the prevailing rule in the Third Circuit and in other federal courts throughout the United States.

Petitioner argues that all suits which happen to be pending at the time a change in the law occurs should automatically be given the benefit of a retroactive application of the change in law (Petition, 15-16) but this position has been expressly rejected by every court which has considered it. In ***Kacher v. Pittsburgh National Bank***, 545 F.2d 842 (3d Cir. 1976), plaintiff sought to recover money damages as a result of the defendant's unconstitutional use of the Pennsylvania replevin statute. Plaintiff's complaint, alleging that the Pennsylvania replevin procedures were violative of the Fourteenth Amendment, was filed before this Court's decision in ***Fuentes v. Shevin***, 407 U.S. 67 (1972), which found the Pennsylvania replevin statute to be unconstitutional. Also prior to ***Fuentes***, the complaint was dismissed by the district court. Following the ***Fuentes*** decision the Third Circuit summarily reversed the district court, based upon ***Fuentes***. The question in the district court at that time became whether ***Fuentes*** should be retroactively applied to award money damages in a case where plaintiff

had asserted the constitutional invalidity of the replevin statute before ***Fuentes*** was decided. Thus, if one substitutes the Third Circuit's ***Jonnet*** decision dealing with foreign attachment for the ***Fuentes*** decision, the foregoing recitation of facts is directly applicable to the present case. In ***Kacher*** the district court applied the standards set forth in ***Chevron Oil Co. v. Huson***, 404 U.S. 97 (1971), for determining whether the rule established in a given case should be applied retroactively, and ruled that the decision in ***Fuentes*** should not be retroactively applied in such a manner as to permit plaintiff to recover money damages because of the unfairness which would result to those who had acted in reliance upon a time-honored and then valid procedure. In affirming the district court's judgment the Third Circuit held that the defendant-creditor should not be penalized for having invoked a statutory procedure which had not at the time been held unconstitutional by any court. The Court of Appeals also held that, consistent with general principles of common law tort liability, plaintiff in a claim for damages under 42 U.S.C. §1983 must allege and establish that the defendant acted with a wrongful intent or for an improper purpose in seizing plaintiff's goods. Inasmuch as plaintiff in the ***Kacher*** case failed to make such allegations against defendant, the Court held that defendant could not be answerable in damages under Section 1983. Contrary to Petitioner's argument, there is no substantial distinction between the respective positions of the plaintiff in ***Kacher*** and the Petitioner in the present action. As a result, the Third Circuit found its decision in ***Kacher*** to be controlling when applied to the present case.

As indicated above, Petitioner relies upon 42 U.S.C. §1983 to support his counterclaim for money damages for use of an unconstitutional process. In the case of ***Rios v. Cessna Finance Corporation***, 488 F.2d 25 (10th Cir. 1973),

plaintiff attempted to recover damages for the pre-*Fuentes* seizure of its property pursuant to the New Mexico replevin statutes, which were subsequently held to be unconstitutional. Just as Petitioner in the present case counterclaimed for money damages pursuant to 42 U.S.C. §1983 prior to the *Jonnet* decision, plaintiff in *Rios* sought money damages under Section 1983 long before the Supreme Court's decision in *Fuentes*. Nevertheless, the Tenth Circuit affirmed the district court's grant of summary judgment for defendant, stating as follows:

> "A statute is presumed to be constitutional until struck down as unconstitutional. Cessna Finance followed the statutory procedure in bringing its replevin action. We therefore hold that §1983 is not applicable because damages are not collectible in a civil rights action against one who followed a statutory procedure presumed to be constitutional." 488 F.2d at 28.

In *Tucker v. Maher*, 497 F.2d 1309 (2d Cir. 1974), another Civil Rights Act case, plaintiff sought money damages for the allegedly unconstitutional attachment of his property pursuant to the Connecticut prejudgment attachment statutes. In affirming the lower court's dismissal of plaintiff's complaint the Second Circuit likened an action for money damages for use of an unconstitutional process under Section 1983 to a common law tort claim of malicious prosecution, and ruled that plaintiff must establish essentially the same elements as exist in that tort in order to succeed in an action under Section 1983. Among the necessary elements is the allegation and proof of an improper purpose or wrongful intent:

> "The common law tort of malicious use of civil process does require that plaintiff establish an improper motive on the part of the defendant. More precisely, the plaintiff must establish that the civil proceedings were initiated without probable cause and primarily for a purpose other than that of securing the adjudication of the claim on which the proceedings were based. Restatement of Torts [§677 (1938)]; W. Prosser, Law of Torts [§114 (3d ed. 1969)]."
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> 497 F.2d at 1315.

As to the corporate and individual defendants who commenced the attachment proceedings, the Court in *Tucker* ruled that they "apparently acted on advice of counsel and no evil intent can be properly ascribed to them." 497 F.2d at 1315. As to the defendant attorney who had represented the corporate and individual defendants in the initial attachment proceedings, the Court held:

> "We think, as a majority of this court did in Fleming v. McEnany, [491 F.2d 1353 (2d Cir. 1974)], that counsel here had a right to rely on the statutory law of the jurisdiction which had not been repealed or replaced, or declared unconstitutional by any competent court at the time it was utilized. If counsel had failed to file the lien to protect his client, he might well be exposed to personal liability. *State legislation is under increasing constitutional attack but until the assault is successful, attorneys should be entitled to rely upon the presumption of constitutionality. Certainly their dependence upon a statute later found vulnerable is not to be equated with the malevolent intent basic to this particular tort. . .*"(Emphasis added).
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> 497 F.2d at 1315-1316.

In the present case the Pennsylvania foreign attachment procedures had not been held unconstitutional by any court at the time this action was commenced. To the contrary, the constitutional validity of said procedures had been expressly upheld by the district court less than one month before Petitioner's rentals were attached in this case, [*Balter v. The*

Bato Company, Inc., 385 F.Supp. 420 (W.D. Pa. 1974)], and again by the district court in dismissing Petitioner's counterclaim. (1a). Moreover, the counterclaim alleges only that Respondent used an unconstitutional process causing money damages to Petitioner. The counterclaim does not allege the element of improper motive or wrongful intent (63a), which the Second Circuit in *Tucker*, as well as the Third Circuit Court in *Kacher v. Pittsburgh National Bank*, *supra*, and *Howell v. Cataldi*, 464 F.2d 272 (3d. Cir. 1972), found to be essential for the establishment of a cause of action for money damages under Section 1983 for the use of an unconstitutional process. Even if Petitioner had alleged the requisite bad faith or malevolent intent in his counterclaim, it would be impossible as a matter of law for him to establish those elements, given the contemporaneous rulings in the district court which upheld the constitutionality of Pennsylvania's foreign attachment procedures.

In another case on point, *Chesney v. Adams*, 377 F. Supp. 887 (D. Conn. 1974), plaintiff in a civil rights action challenged the constitutionality of Connecticut statutes under which he was transferred, without prior hearing, from a state prison to a state mental hospital. Pursuant to 42 U.S.C. §1983 plaintiff sought declaratory relief, as well as money damages. The Court carefully examined the statute against existing precedent and determined that it clearly violated the Fourteenth Amendment. Notwithstanding that finding, the Court ruled:

> "Although the statute under which defendant committed plaintiff was constitutionally defective, plaintiff is not entitled to damages. Defendant was acting in good faith, pursuant to a law that had not then been declared invalid."
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> 377 F.Supp. at 896.

The decision in the *Chesney* case is in complete accord with the prevailing rule that plaintiff in a civil rights action—

though he may be entitled to receive declaratory and injunctive relief against future harm, as Petitioner did here—is not entitled to recover money damages where the defendant acted in good faith and in reliance upon a statute which had not been found to be constitutionally defective at the time his actions were taken.

Still another civil rights case on point is *Slate v. McFetridge*, 484 F.2d 1169 (7th Cir. 1973), which dealt with the liability of Chicago city officials for failing to respond to a request for a permit for use of a city park for a political rally during the 1968 democratic national convention. In that case the Seventh Circuit stated:

> "It is a principle of elemental justice that a man not be held liable in damages for actions or omissions which he could not or should not be expected to have known would cause his liability. When he is a public servant, and when his acts are committed while he is arguably engaged in the pursuit of his official duties, strict liability becomes a proposition more weighty still, for good men may be deterred from the quest for public service by the imposition of such a burden. With these policies in mind, *federal courts have reached a general consensus that liability for damages under 42 U.S.C. §1983 must be determined by the legal standards in existence at the time of an alleged violation of constitutional rights*. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967); Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973); Gaito v. Strauss, 249 F.Supp. 923, 934-935 (W.D. Pa.), aff'd on other grounds, 368 F.2d 787 (3d Cir. 1966); Bowens v. Knazze, 237 F.Supp. 826 (N.D. Ill. 1965); cf. Striker v. Pancher, 317 F.2d 780 (6th Cir. 1963).
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> "Retroactive application of fresh precedent has no place in fixing the standard of conduct for damage suits

under Section 1983." (Emphasis added). 484 F.2d at 1174.

See also Morales v. Hamilton, 391 F.Supp. 85 (D. Ariz. 1975); *Robinson v. Leahy*, 401 F.Supp. 1027, 1031 (N.D. Ill. 1975); *Knell v. Bensinger*, 380 F.Supp. 494 (N.D. Ill. 1974), *aff'd.* 522 F.2d 720 (7th Cir. 1975).

In *Hogopian v. Consolidated Equities Corp.*, 397 F. Supp. (N.D. Ga. 1975), the Court was presented with a civil rights claim for money damages based upon a prehearing seizure of property pursuant to a Georgia attachment statute of questionable constitutional validity. The Court dismissed plaintiff's claim, holding that, absent some improper motive, one acting pursuant to a statutory scheme assumed to be constitutional cannot be held liable for damages under 42 U.S.C. §1983 if the scheme is later held to be unconstitutional.

Petitioner has attempted to manufacture a conflict among the federal courts of appeal by citing the decisions of four three-judge courts, all within the United States Court of Appeals for the First Circuit,[1] and representing that the decision of the court below is contrary to those cases. Petitioner's reliance upon these four cases is misplaced because *none* of the said three-judge courts even considered the issue which was decided by the court below. Petitioner confuses the question of whether a given state procedure is unconstitutional with the question of whether, once that

[1]*Schneider v. Margossian*, 349 F. Supp. 741 (D. Mass. 1972).

Gunter v. Merchants Warren National Bank, 360 F. Supp. 1085 (D. Me. 1973).

Trapper Brown Construction Co., Inc. v. Electromech, Inc., 358 F. Supp. 105 (D.N.H. 1973).

McClellan v. Commercial Credit Corp., 350 F.Supp. 1013 (D.R.I. 1972), aff'd. mem. sub nom. *Georges v. McClellan*, 409 U.S. 1120 (1973).

procedure has been held unconstitutional, one who had previously made use of said procedure in reliance upon existing law should thereafter be subject to damages for use of an unconstitutional process. The First Circuit cases considered only the first issue; they did not consider the issue of whether their decision should be applied retroactively to other cases pending at the time of their decision so as to permit an award of money damages against one who acted pursuant to a then valid state procedure.

In *Schneider v. Margossian*, *supra*, plaintiffs did not even seek money damages. In *Gunter v. Merchants Warren National Bank*, *supra*, and *McClellan v. Commercial Credit Corp.*, *supra*, the courts enjoined further attachment of plaintiff's property (just as did the three-judge court in the present case), but did not discuss the matter of damages; rather, they remanded the issue of damages to the district court for finding and ruling. In considering the question of damages, the district courts would presumably be bound by the standards set forth in *Chevron Oil Co. v. Huson*, *supra*, *Linkletter v. Walker*, 381 U.S. 618 (1965), and other leading cases to determine whether retroactive application of the new rule of law would be appropriate insofar as damages are concerned. In the last of Petitioner's First Circuit cases, *Trapper Brown Construction Co., Inc. v. Electromech, Inc.*, *supra*, the plaintiff expressly waived any claim for damages, and so the three-judge court never considered the issue. Thus, the decision reached by the court below is in no way contrary to any of the cases relied upon by Petitioner. Counsel for respondent is not aware of a single federal court which has considered the issue which was before the court below and reached a different conclusion.

Petitioner argues that this Court's decision in *Fuentes v. Shevin*, *supra*, clearly foreshadowed an end to the Pennsylvania foreign attachment rules. While that issue is not now

before the Court, it may be useful to point out briefly that the remedy of foreign attachment to secure jurisdiction over a nonresident appeared to be very much alive in October, 1974, when this action was commenced.

The Pennsylvania foreign attachment rules operated in a fashion which was similar to the foreign attachment procedures of many other states, and said procedures had successfully withstood many attacks on constitutional grounds. In *Ownbey v. Morgan*, 256 U.S. 94 (1921), the Supreme Court affirmed the constitutionality of a Delaware foreign attachment procedure far more severe than the Pennsylvania rules. The creditor in *Ownbey* obtained a writ of foreign attachment by filing an affidavit with the prothonotary, without prior hearing or notice to the debtor. The Delaware statute which sanctioned this procedure also provided that the nonresident debtor could not even enter a general appearance and defend the action on its merits without first giving security in an amount sufficient to discharge the attachment. The defendant in *Ownbey* was unable to provide the necessary security and suffered a default judgment which was executed on the attached property. Unmoved by this result, this Court sustained the statute in the face of a broadside attack based on the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment. The Court perceived nothing unconstitutional in a procedure far more burdensome to a nonresident debtor than the mere continuation of an attachment after a defendant's general appearance, an analogous feature of the Pennsylvania rules.

In *McKay v. McInnes*, 279 U.S. 820 (1921), the Supreme Court considered the constitutionality of a Maine statute which authorized prejudgment attachment without notice or hearing in any civil action, irrespective of the residency of the defendant. In a memorandum opinion, the Court upheld the statute on the authority of *Ownbey v. Morgan, supra*.

More recently, in *Lebowitz v. Forbes Leasing and Finance Corporation*, 456 F.2d 979 (3d Cir. 1972), cert. den. 409 U.S. 843, reh. den. 409 U.S. 1049, the Third Circuit thoroughly reviewed and upheld the constitutionality of all aspects of the Pennsylvania foreign attachment rules. The *Lebowitz* Opinion was handed down several months prior to *Fuentes*, although this Court twice denied certiorari in *Lebowitz* subsequent to *Fuentes*.

In *Fuentes*, which was decided June 12, 1972, this Court struck down the Florida and Pennsylvania replevin statutes as being violative of the Fourteenth Amendment. In so holding, the Court carefully distinguished the state's interest in maintaining replevin statutes from the quite different interests of the state in securing jurisdiction over the person of a nonresident defendant. The *Fuentes* decision expressly acknowledged that the need to obtain immediate jurisdiction over nonresident defendants in state courts was "clearly a most basic and important public interest," which justified the attachment of property without prior notice or hearing. 407 U.S. at 91-92. In support of this proposition the Court cited the case of *Ownbey v. Morgan, supra*. If the *Fuentes* case foreshadowed an automatic end to all prejudgment seizures of property, as argued by Petitioner, this Court would not have taken pains to state that there are indeed some situations in which the seizure of property without prior hearing or judgment is permissible, and that one such situation exists where an attachment is necessary to secure jurisdiction over a nonresident in a state court. Moreover, there would have been no point in expressly revitalizing the precedential value of *Ownbey v. Morgan*.

The next major case involving creditor's remedies was this Court's decision in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), handed down less than five months before the filing of Respondent's praecipe for writ of foreign attach-

ment in the present case. In *Mitchell* the Court upheld the validity of a Louisiana statute which permitted the sequestration of personal property on the *ex parte* application of a creditor, without notice to the debtor or opportunity for a hearing. In so holding, the Court pointed out that the attachment of property without prior hearing was both a lawful and common remedy, and again cited with approval the cases of *Ownbey v. Morgan* and *McKay v. McInnes, supra*. 416 U.S. at 611-614.

The decision in *Mitchell* was property recognized by several members of the Court as a substantial departure from the principles which were set forth in *Fuentes v. Shevin*.[2] In his dissenting opinion in *Mitchell*, Justice Stewart (who wrote the majority opinion in *Fuentes*) thoroughly compared the two cases, and concluded as follows:

> "In short, this case is constitutionally indistinguishable from Fuentes v. Shevin, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent. In light of all that has been written in *Fuentes* and in this case, it seems pointless to prolong the debate. Suffice it to say that I would reverse the judgment before us because the Louisiana sequestration procedure fails to comport with the requirements of due process of law.

[2]The *Fuentes* case was decided by a four to three majority, with Justices Powell and Rhenquist not participating. The majority consisted of Justices Stewart, Douglas, Marshall and Brennan; the dissenters were Chief Justice Burger and Justices White and Blackmun. In *Mitchell* the line-up was completely reversed, with Justices Powell and Rhenquist joining a majority made up of Chief Justice Burger and Justices White and Blackmun. The dissenting Justices in *Mitchell* were the same members of the Court who had made up the majority in *Fuentes*, Justices Stewart, Douglas, Marshall and Brennan. This change in the makeup of the Court, coupled with both the majority and dissenting opinions in *Mitchell*, appeared to signal a significant withdrawal from the sweeping language in *Fuentes* regarding the standards to be applied to prehearing seizures of tangible personal property. *See, e.g., In the Matter of The Oronoka*, 393 F. Supp. 1311 (D. Me. 1975).

> "I would add, however, a word of concern. It seems to me that unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so. *Cf. Roofing Wholesale Co. v. Palmer*, 108 Ariz. 508, 502 P2d 1327 (1972). A substantial departure from precedent can only be justified, I had thought, in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment. Yet the Court today has unmistakably over-ruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of stare decisis."
>
> 416 U.S. at 634-5.

Hence, even if one were sufficiently prescient to conclude on the basis of *Fuentes* that all prejudgment liens on property were abrogated, the Court's unquestioned withdrawal from that broad view in *Mitchell v. W. T. Grant* made it appear that certain prejudgment liens or seizures-particulalry those where the state has a "most basic and important public interest" such as the securing of jurisdiction over nonresidents—continued to be valid.

Shortly after the *Mitchell* decision the constitutionality of the Pennsylvania foreign attachment rules was again challenged and upheld in an opinion by Judge Rosenberg of the United States District Court for the Western District of Pennsylvania in the case of *Balter v. The Bato Company, Inc.*, 385 F.Supp. 420 (W.D. Pa. 1974). Judge Rosenberg's opinion in that case was issued on September 6, 1974, less than a month before Respondent's praecipe for writ of attachment in the present case was filed. The Pennsylvania foreign attachment rules were once again found to be constitutional by the district court in Judge Gourley's opinion dated December 2, 1974, in the case captioned

McFadden v. G. H. McShane, Inc., at Civil Action No. 74-1090, which denied McFadden's request for the appointment of a statutory court and dismissed his Complaint.

The opinions of the district court below in *Balter v. The Bato Company, Inc., supra*, and *McFadden v. McShane, supra*, were both issued at or near the time when the present action was commenced. Unlike the First Circuit cases cited by Petitioner, Judges Rosenberg and Gourley considered the Pennsylvania foreign attachment procedures in the light of *both Fuentes* and *Mitchell*.[3] The Supreme Court's ruling in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), had not yet been issued at the time that the opinions of Judges Rosenberg and Gourley were handed down. Plaintiff submits that perhaps the most persuasive argument that *Fuentes* did not clearly foreshadow an end to the Pennsylvania foreign attachment procedures can be found in the simple fact that two members of the court to which this action was removed issued separate opinions which upheld the constitutionality of the foreign attachment rules in late 1974, at or about the same time that Respondent caused the attachment of Petitioner's rentals.

II. PETITIONER IS NOT ENTITLED TO RETROACTIVE APPLICATION OF THE *JONNET* DECISION TO SEEK AN AWARD OF MONEY DAMAGES MERELY BECAUSE HIS COUNTERCLAIM WAS PENDING AT THE TIME *JONNET* WAS DECIDED

Petitioner's second contention appears to have two branches. First, Petitioner argues that as the successful party

[3]A further significant distinction between the cases emanating from the First Circuit and the present one is that none of those cases deals with an attachment which has as its purpose the securing of jurisdiction over a nonresident defendant. The various New England state statutes under attack in those cases permitted the indiscriminate attachment of a defendant's property, regardless of whether he was a resident of the state.

in the case which changed the law, he has been denied "the fruits of his victory" by the court below. This argument ignores the fact that, as stated by the court below, "it is clear that the constitutional question regarding the foreign attachment provision was adjudicated by this Court in *Jonnet*." (61a-62a). Thus, Petitioner was not the successful party in the case which changed the law. Even if Petitioner had succeeded in changing the law of Pennsylvania, his entitlement to an award of money damages (as opposed to injunctive relief against further attachment of his rentals) would have depended upon the consideration of such elements as (1) whether the decision established a new principle of law by overruling part precedent on which litigants may have relied; (2) whether a retroactive award of money damages would further the operation of the new rule; and (3) whether a retroactive award of money damages would work an injustice or hardship upon those who may have relied upon prior law. *Chevron Oil Co. v. Huson, supra*.

Petitioner cites the case of *Simpson v. Union Oil Co.* 396 U.S. 13 (1969), an antitrust case in which a plaintiff whose business was injured was permitted to recover damages, in support of his argument that the decision of the three-judge court in the case at Civil Action No. 74-1090 entitles him to seek money damages through his counterclaim in the present case. Petitioner's reliance on this case is misplaced.

The right to recover damages in a private action for violation of the antitrust laws is mandated by Section Four of the Clayton Act.

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall* recover threefold the

damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis added). 38 Stat. 731, 15 U.S.C. §15.

The primary purpose of the foregoing statute is to supply an ancillary force for the enforcement of the antitrust laws by giving individuals an incentive to sue when they are injured by antitrust violations. *Ames Co. v. Bostitch, Inc.* 240 F. Supp. 521 (S.D.N.Y. 1965). As stated by the Fifth Circuit in *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659 (5th Cir. 1974), *rehearing denied* 503 F.2d 1403, *cert. denied* 420 U.S. 929 (1975):

> "Although the treble damage provision may be partially justifiable on compensatory grounds, its principal purpose is to deter antitrust violations. The prospect of a damage award multiplied three-fold should provide an incentive for private parties to instigate costly and uncertain litigation, thus supplementing Governmental enforcement." (Foot-notes omitted). 500 F.2d at 667.

If there were no assurance of a substantial recovery to a private antitrust plaintiff, *particularly* when the alleged violation appears at the time of filing suit to be doubtful or on the frontier of existing antitrust law, there would be a disincentive to proceed with such actions and the private enforcement purpose of Section Four of the Clayton Act would be thwarted. There is no analogous public interest or purpose in providing incentive for private citizens to bring actions (much less counterclaims) challenging the constitutionality of state rules of civil procedure, and therein lies one of the distinctions between the antitrust case cited by Petitioner and the present case. The ruling in *Simpson v. Union Oil Co., supra*, that plaintiff in that case was entitled to damages had nothing to do with a "rule" that the principle of nonretroactivity does not apply to the case in which a change in the law is first announced because plaintiff should

receive the fruits of his victory. Rather, this Court's holding in *Simpson* was simply an application of a statutorily mandated right to damages for a violation of the antitrust laws. The right of a successful plaintiff in an antitrust action to recover damages regardless of whether defendant may have relied upon earlier law constitutes an exception to the general principle that one will not be held liable in damages where he has justifiably relied upon previously existing law, where retroactive application of the new rule will not further its operation, and where retroactive application of the new rule will cause injustice. And the exception in antitrust cases is grounded upon the strong public policy which encourages private enforcement of the antitrust laws.

A further basis for distinguishing the *Simpson* case from the present one is that the Supreme Court's decision in *Simpson* did not establish a new principle of law, either overruling past precedent on which litigants may have relied, or by deciding an issue of first impression. In that case plaintiff operated a gasoline service station business as a retail dealer of defendant oil company. The Court found that the defendant's consignment contract, which called for a fixed price for the sale of gasoline to consumers, violated the Sherman Act. Defendant's position had been that its consignment contract was lawful under the Supreme Court's holding in *United States v. General Electric Co.*, 272 U.S. 476 (1926), wherein the Court upheld a similar consignment arrangement. The Court distinguished the *General Electric* case, however, on the basis that the consignment there had dealt with patented products, where the holder of the patent is entitled to extraordinary protection on the sale of his product during the term of the patent. No such protection was necessary or called for in the sale of gasoline. Because the Court did not overrule the *General Electric* case there was no new principle of law established in *Simpson*. Indeed,

the Court characterized its own ruling in *Simpson* as being "not innovative." 396 U.S. at 14. As a result, the rule against retroactive application of a new legal principle could not have been applied in that case in any event.

The case of *Stovall v. Denno*, 388 U.S. 293 (1967), cited by Petitioner, was not a civil rights action for damages. Rather, it was a federal habeas corpus proceeding whereby plaintiff sought to set aside his criminal conviction for first degree murder because he had been identified by an eye witness in the absence of his counsel, in a manner which the Supreme Court found unconstitutional in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967). The Court held in *Stovall* that its rulings in the *Wade* and *Gilbert* cases requiring the exclusion of tainted identification evidence in a criminal trial would be applied prospectively only, with the result that petitioner Stovall could not benefit from them. The Court's reason for not applying the *Wade* and *Gilbert* rules retroactively was that to do so "would seriously disrupt the administration of our criminal laws." 388 U.S. at 300. The fact that the Court did give Wade and Gilbert the benefit of the rules established in their cases provides scarce support for Petitioner's contention in the present case because the considerations which exist concerning retroactive application of a newly established rule in a criminal action differ substantially from those which exist in determining how to apply a change in the law in the context of a Section 1983 action for money damages. In the criminal action, for example, there are no "defendants" who stand to be punished for having acted in good faith and in reliance upon laws which had not been declared unconstitutional. Moreover, in the criminal context, there need be no consideration of the question whether one who seeks money damages under Section 1983 can establish the requisite improper motive on the part of the defendant. In

short, the fact that Messrs. Wade and Gilbert benefitted from the new rules announced in their cases cannot fairly be cited for the proposition that a constitutional change in civil law gives rise to an action in money damages under Section 1983 to the party who succeeded in bringing about the change.

Petitioner also cites the cases of *Gray v. Creamer*, 465 F.2d 179 (3d Cir. 1972) and *United States ex rel. Tyrrell v. Speaker*, 471 F.2d 1197 (3d Cir. 1973) as support for his argument that the rule which favors only prospective application of a new principle of law does not apply to the case in which the new principle is announced. These cases do not support Petitioner's contention.

In *Gray* there is no mention of damages anywhere in the Court's opinion. Indeed, it appears that plaintiff in that case asked only for injunctive and declaratory relief, and did not request damages. 465 F.2d at 181.

In *Tyrrell* the Third Circuit reversed the district court's dismissal of plaintiff's complaint and remanded the case "with the direction to proceed to trial to determine whether or not Tyrrell's rights under the First, Eighth and Fourteenth Amendments have been violated. If they have, Tyrrell *may* be able to recover damages." (Emphasis added). 471 F.2d at 1204. There was no consideration in the *Tyrrell* opinion of the factors set forth to determine retroactivity in *Chevron Oil Co. v. Huson, supra*, or in *Linkletter v. Walker, supra*. It is submitted that the statement that plaintiff "may" be able to recover damages is hardly an indication that his entitlement to damages will be automatic in the event that liability is proved. Rather, upon a finding of liability, the district court would presumably be obliged to review the various factors in *Chevron*, *Linkletter* and *Kacher v. Pittsburgh National Bank, supra*, to determine if the ruling should be retroactively applied in order to award plaintiff damages, in addition to

the injunctive relief to which he would be entitled in any event.

Nor can the above-quoted remark in *Tyrrell* be properly cited as supportive of a general rule that damages will be permitted retroactively in the case where a new principle of law is announced, or in other cases which were filed but not decided before the new principle was announced — even in the civil rights area. In fact, the general rule in civil rights cases appears to be just the opposite. *See*, *Slate v. McFetridge*, *supra*; *Morales v. Hamilton*, *supra*; *Robinson v. Leahy*, *supra*; and *Knell v. Bensinger*, *supra*.

As indicated previously, the law in the Third Circuit regarding Pennsylvania's foreign attachment rules changed with the *Jonnet* decision. That decision made the statutory court's holding in Petitioner's other case at Civil Action No. 74-1090 automatic. Thus, Petitioner cannot fairly argue at this point that it was his case which succeeded in changing the law.

The second, or alternative, branch of Petitioner's second contention is that *all* cases which challenged the foreign attachment procedures which were still pending at the time of the *Jonnet* decision should be given the benefit of retroactive application of that rule, while at the same time conceding that plaintiffs whose cases are filed subsequent to *Jonnet*, even though based upon facts preceding *Jonnet*, would have no right to damages because of the nonretroactivity principle. (Petition, 15-16). As Petitioner puts it, "the decisive factor in determining whether a decision should have only prospective application should be the date when the other suits were filed." (*Id.*). Not surprisingly, Petitioner cites no cases which stand for the proposition that one's right to damages should depend upon whether his suit was filed the day before or the day after a new principle of law is announced. Doubtlessly, the paucity of case law stems from

the fact that the proposition is wholly illogical and arbitrary. In considering whether to apply a new rule of law retroactively a court must weigh such factors as whether retroactive application will further or retard the operation of the new rule, whether retroactive application will impose inequitable results or injustice, and whether defendant acted with an improper motive in making use of the prior law. None of these factors has any connection with the date on which the plaintiff's complaint happens to have been filed. There simply is no rationale for the arbitrary distinction drawn by Petitioner between cases filed before and after *Jonnet*, and Petitioner has offered none.

CONCLUSION

The federal courts have consistently held that one who, in good faith, acts under a time-honored statutory procedure presumed to be constitutional cannot later be held liable for damages under 42 U.S.C. §1983 when the procedure is overturned. There is no conflict among said courts regarding this principle. Moreover, there are no valid public policy reasons why the existing rule which favors only prospective application of a change in the law should be altered to permit automatically an award of windfall damages to persons whose cases may have been pending at the time the change is announced. For these reasons the order of the court below which affirms the dismissal of Petitioner's Counterclaim is a proper disposition of this case, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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